K & K Transportation Corp., Inc. *and* **Terry G. Geho** *and* **Robert E. Hudson** *and* **Eva Vesper.** Cases 17-CA-9826, 17-CA-9853, and 17-CA-9882

July 30, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On October 22, 1981, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge only to the extent consistent herein.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by refusing to reinstate Sharon Hudson. We disagree.

At issue is whether Respondent had a basis for concluding that Sharon Hudson was involved with her husband, Robert Hudson, in the sabotage of one of Respondent's trucks on November 25, 1979. The Administrative Law Judge correctly set forth the general rule with regard to strike misconduct; i.e., that an employer must demonstrate an honest belief that an employee was engaged in strike misconduct. Once an employer establishes this belief, the burden shifts to General Counsel to prove that the employee was not *in fact* engaged in the activity in question or that the activity was protected. *General Telephone Company of Michigan*, 251 NLRB 737 (1980). And in an unfair labor practice strike, the misconduct of the striker must be balanced against the severity of the employer's unfair labor practices which provoked the dispute. *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).[2]

Robert and Sharon Hudson worked as a driving team for Respondent prior to the strike. The alleged misconduct of the Hudsons occurred on November 25, 1979, and is fully described by the Administrative Law Judge. Briefly the facts are as follows: one of Respondent's drivers, Joseph Roy, had stopped his rig at a truckstop in Council Bluffs, Iowa. Upon returning from a change booth, Roy noticed Robert Hudson leave the cab of Roy's truck and run toward a blue and white auto, which he testified belonged to Hudson. Sharon Hudson was in the car. Roy examined his rig, found no apparent damage, and drove off. Upon traveling a short distance, the trailer dropped from the tractor causing extensive damage. The trailer dropped because the kingpin had been removed from the fifth wheel.[3] Roy informed Respondent's president, Everett Alger, of the incident upon returning to the facility,[4] identifying both Hudsons in his report. Alger filled out a "Work Stoppage and Equipment . . . Damage Report" wherein he set out the facts as related to him by Roy, noting that Robert Hudson had pulled the kingpin on the trailer and that Sharon Hudson was also seen at the truckstop.

The Administrative Law Judge found, and we agree for the reasons set forth by him, that Respondent established a sufficient basis for its belief that Robert Hudson had sabotaged Roy's truck and that Robert Hudson's conduct was sufficiently serious to support his discharge. The Administrative Law Judge, however, found insufficient basis to conclude that Sharon Hudson participated in the misconduct.

As a general rule unauthorized acts of violence on the part of individual strikers on a picket line are not chargeable to other union strikers in the absence of proof that identified them as participating in such violence. Here, however, the misconduct did not occur on a picket line. Thus, we are not confronted with the situation of a few striking employees engaging in misconduct under cover of other nonparticipating striking employees. Rather, the misconduct in question occurred miles away from Respondent's facility and was engaged in by two employees who, as husband and wife, had apparently jointly agreed to travel to that location. In these circumstances, as the Administrative Law Judge found, the sabotage was not an act of impulsive behavior done on the spur of the moment, but was apparently the result of premeditated conduct engaged in far from the picket line. Taken as a whole, the events in question were sufficient to establish an honest belief by Respondent that Sharon Hudson was a party to her husband's sabotaging its

[1] General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In joining the dismissal of the complaint as to Sharon Hudson, Chairman Van de Water finds it unnecessary to rely on *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).

[3] The kingpin and fifth wheel are mechanisms that connect a trailer to a tractor.

[4] Respondent's facility is located in Omaha, Nebraska.

truck,[5] and that she, was well as he, was not entitled to reinstatement. Additionally, General Counsel failed to overcome Respondent's honest belief by proving that Sharon Hudson had not engaged in the alleged misconduct.[6] Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER FANNING, dissenting in part:

Contrary to my colleagues, I agree with the Administrative Law Judge that Respondent did not have an honest belief that Sharon Hudson was jointly responsible with her husband, Robert Hudson, for sabotaging Respondent's truck. The Board has long held that—to establish an honest belief—there must be some concrete proof that an employee has engaged in the alleged misconduct before that misconduct will be attributable to the employee; in other words, the mere presence of the employee is not enough to establish the misconduct. *General Telephone Company of Michigan*, 251 NLRB 737, 739 (1980); *MP Industries, Inc.*, 227 NLRB 1709 (1977); *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).

This necessary concrete proof is lacking in the present situation. Sharon Hudson was seen in the Hudson automobile at the time of her husband's misconduct. She was not seen aiding her husband nor did Respondent have a reason to believe that she did aid her husband. Respondent's contention that it held an honest belief that she engaged in misconduct is weakened, and in my opinion destroyed, by the failure of its president, Everett Alger, to mention his belief that Sharon Hudson had engaged in the misconduct when Alger spoke to Robert Hudson and accused him of the sabotage. Additionally, in its letter to the Union detailing the incident, Respondent failed to mention its belief that Sharon Hudson was involved in the incident. My colleagues apparently find that Alger's subsequent damage report illustrates that Respondent believed that Sharon Hudson was involved in the sabotage. However, in that report, Alger merely noted that Robert Hudson's "[w]life was seen" at the site of the truck sabotage.

Respondent, through its *ex post facto* contention, seeks to deprive Sharon Hudson of reinstatement to her former position with Respondent. I would affirm the Administrative Law Judge's findings and conclusions concerning Sharon Hudson and order that she be offered reinstatement to her former position.

[5] Our dissenting colleague points to the fact that Respondent's president, Everett Alger, never mentioned Sharon Hudson's name in a letter to the Union nor in conversation with her husband. Any doubt that Respondent at all times believed that Sharon Hudson was involved in the sabotage is removed by the fact, as noted above, that, subsequent to the sabotage incident, Alger filed a report wherein he stated that Sharon Hudson was seen at the truckstop at the time of the sabotage.

[6] Denials by both Robert and Sharon Hudson that they were at the truckstop on the day that Respondent's truck was sabotaged were not credited by the Administrative Law Judge. Rather, he credited Alger and the truckdriver who witnessed Robert Hudson running from his truck and viewed Sharon Hudson in the Hudson automobile.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this consolidated proceeding was held from April 15 through 17, 1981, and is based on unfair labor practice charges filed against K & K Transportation Corp., Inc., herein called Respondent, by Terry G. Geho in Case 17-CA-9826 on August 4, 1980, by Robert E. Hudson in Case 17-CA-9853 on August 12, 1980,[1] and by Eva Vesper in Case 17-CA-9882 on August 27, 1980.[2] In September 1980 the Regional Director for the National Labor Relations Board for Region 17, on behalf of the Board's General Counsel, issued separate complaints in each of the aforesaid cases alleging that Respondent violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, herein called the Act, and issued an order consolidating these cases for hearing. Respondent filed timely answers to the complaints denying the commission of the alleged unfair labor practices. Respondent admitted that the Union herein, General Drivers & Helpers Union, Local No. 554, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act and that Respondent meets the Board's applicable discretionary jurisdictional standard and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

FINDINGS OF FACT

I. BACKGROUND

Respondent is in the interstate trucking business as a contract carrier. Its place of business is situated in Omaha, Nebraska. On November 14, 1978, the Union was certified by the National Labor Relations Board as the exclusive bargaining representative of Respondent's full-time and regular part-time over-the-road truckdrivers employed at its Omaha facility. Negotiations for a collective-bargaining agreement commenced on December 22, 1978, and continued on various dates through November

[1] The charge in Case 17-CA-9853 was amended on September 22, 1980.

[2] The charge in Case 17-CA-9882 was amended on September 23, 1980.

19, 1979, without success. On November 3, 1979, the Union called a strike against Respondent which was supported by a substantial number of the unit employees. In conjunction with the strike the employees picketed Respondent's facility from November 3, 1979, through May 7, 1980.

In Cases 17-CA-9152 and 17-CA-9332 the Union filed unfair labor practice charges in 1979 against Respondent alleging violations of Section 8(a)(1) and (5) of the Act. These cases were consolidated for hearing and heard before Administrative Law Judge Earldean V. S. Robbins on March 4, 1980. Administrative Law Judge Robbins issued a Decision and recommended Order in this matter on August 4, 1980, to which Respondent filed exceptions. On January 26, 1981, the Board issued its Decision and Order. See *K & K Transportation Corp., Inc.*, 254 NLRB 722 (1981). The Board concluded that subsequent to the Union's certification on November 14, 1978, and contemporaneous with the negotiation meetings in the ensuing year, Respondent engaged in numerous violations of Section 8(a)(1) of the Act designed to discourage the employees from supporting the Union and violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a bonus wage system and its delay in furnishing the Union certain information. The Board also found that Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act by engaging in "surface bargaining" without an intent to reach a collective-bargaining agreement.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Case 17-CA-9826*

1. On May 12, 1980, Respondent's president, Alger, allegedly informed employee Geho that Respondent would never have a union and if Geho wanted union representation he should terminate his employment and go to work for a union company (complaint, par. 5)

Terry Geho was employed by Respondent from April 12, 1979, until July 15, 1980, as an over-the-road driver. During the Union's strike and the picketing associated with the strike which continued from November 3, 1979, until May 7, 1980, Geho continued to work for Respondent. As a matter of fact Geho, during this period, attempted to oust the Union as the employees' bargaining representative. In January 1980, with the assistance of Respondent's president, Alger, he solicited the employees who had not supported the Union's strike to sign a petition asking the NLRB to conduct an election to decertify the Union. In February 1980 Geho personally filed a decertification petition with the NLRB's Regional Office. Not only did Geho through his decertification conduct lead Respondent to believe that he was opposed to representation by the Union, but in March 1979 Respondent was informed that Geho had refused to testify on behalf of the General Counsel against Respondent in the unfair labor practice hearing before Administrative Law Judge Robbins in Cases 17-CA-9152 and 17-CA-9332.[3]

In connection with the filing of the decertification petition, Geho and other employees who had not supported the Union's strike proposed to Respondent President Alger that Respondent deal directly with the employees as a group rather than with the Union and that Alger agree to improve the employees' terms and conditions of employment in certain enumerated respects. The employees reduced their proposed improved terms and conditions of employment into writing and in January 1980 submitted their written proposals to Alger. The employees, as stated in their written proposal submitted to Alger, asked that Alger consider and accept the improved terms and conditions of employment they were proposing, thereby making it unnecessary to have a labor union negotiate on their behalf. Alger told the employees he would consider their proposals.

Geho testified that after the employees submitted their written proposals to Alger that Geho periodically asked Alger when he would discuss the proposals with the employees and enter into an agreement embodying the proposals. Alger replied, according to Geho, that he was unable to do anything until the Union's strike ended and the Union's unfair labor practice charges had been resolved. Geho further testified that on May 12, 1980, in the presence of Safety Director Clary, Geho again spoke to Alger about this subject and that Alger told him Respondent would never have a union, that if Geho wanted a union he could buy out Alger or find a job with a union company. In response, Geho testified that he informed Alger that he would no longer help him get rid of the Union. Alger specifically denied making the aforesaid remarks attributed to him by Geho when they spoke on May 12, 1980. In terms of demeanor Alger impressed me as the more credible witness and for this reason I reject Geho's testimony that Alger told him Respondent would never have a union and invited Geho to either buy out Alger or terminate his employment if he wanted union representation. I have considered Respondent's failure to have Clary testify about the May 12 meeting. Nonetheless, because Geho in terms of demeanor did not impress me as an honest witness when he testified that Alger made the disputed statements and because Alger, in terms of demeanor impressed me as a credible witness when he denied making the disputed statements, I have credited Alger's testimony in this respect.

Based on the foregoing, I shall recommend that this allegation be dismissed in its entirety.

2. On May 13, 1980, Respondent allegedly discharged Geho (complaint, par. 6(a))

Terry Geho testified that on May 13, 1980, in the morning, when he phoned Respondent's office to deter-

[3] The General Counsel attempted to subpoena Geho as a witness in that proceeding. Geho in no uncertain terms informed counsel for the General Counsel that he did not intend to testify for the General Counsel, would do everything in his power to avoid being served with a subpoena, and if served would not comply with the subpoena. Respondent was advised of Geho's conduct when during the hearing counsel for the General Counsel attempted to place Geho's affidavit into evidence.

mine if he was scheduled to be dispatched that day, he was notified by Alger to pick up his personal belongings because he was fired. Geho further testified that the next morning, May 14, he phoned Alger and asked why he had been fired, but without waiting for an answer told Alger he intended to complain to a number of governmental agencies including the NLRB. Alger replied that Geho was not fired and was scheduled to be dispatched that evening. Geho declined the dispatch, as was his right under the Company's dispatch procedure, and was dispatched the next day. Geho's account of his *May 14* conversation with Alger is corroborated by his wife, Patricia Geho, who testified she listened in on an extension phone.

Alger testified that he did not discharge Geho on May 13 and that on May 14 Geho did not suggest that Alger had terminated him. In terms of demeanor Alger impressed me as a more credible witness than Terry Geho and Patricia Geho and it is for this reason that I reject Geho's testimony that he was discharged by Alger on May 13, 1980.[4] I therefore shall recommend that this allegation be dismissed.

3. On July 14, 1980, Respondent discharged Geho (complaint, par. 6(c))

a. *The evidence*

Geho was dispatched to the east coast on July 6, 1980. On July 12 on his return trip he was hauling a load of watermelons when his tractor broke down, when the driveline twisted. This malfunction cost Respondent $1,160. Geho was discharged because Respondent blamed him for the breakdown.

Geho testified that what happened to the driveline was not his fault, but was caused when the U-joint which holds the driveline in place worked loose due to either normal wear and tear or because of improper maintenance. He testified that on July 8 he observed that there was something wrong with the driveline because he could move it up and down which indicated that the U-joint was going bad, that on July 9 the problem with the driveline got worse as it started to vibrate and make a lot of noise, and that this got progressively worse on July 10 and 11 and that on July 12, just before he was due to cross from Illinois into Missouri, the vibration and noise became so bad that he pulled over to the side of the road and inspected the driveline; he observed it was in an arching position. When he moved the truck forward so it would be further off the highway, Geho testified the driveline twisted, thereby making it impossible to drive the truck.

Geho testified that for several days prior to July 12 he had notified representatives of the Company about the problem he was having with the driveline, but was instructed to continue driving the truck. Specifically, Geho testified that on July 8 he phoned Respondent's terminal and asked Dispatcher Hutchison for permission to have the driveline checked but that Hutchison refused to permit him to take the time to do this. That from July 8 to 11 he mentioned the problem he was having with the driveline when he spoke to Safety Director Clary and Maintenance Supervisor DeWitt and that on July 11, when he told Clary that the truck was becoming impossible to drive due to the noise and the vibration, Clary told him to "nurse" the truck in. Clary and DeWitt specifically deny that Geho informed them that he was experiencing trouble with the driveline or said anything to them which indicated he was having such a problem. DeWitt, who is Respondent's maintenance supervisor and is responsible for all of the maintenance work done on its equipment, testified that the normal practice for a driver on the road who is having problems with his equipment is to speak to him about the matter and that if the driver referred to a mechanical problem when speaking to either Hutchison or Clary that they would refer the matter to DeWitt. DeWitt testified that during the trip which ended with the July 12 breakdown Geho did not speak to him about any mechanical problems and that Clary never informed him that Geho was having a problem with the equipment. Clary and DeWitt impressed me as credible witnesses. Geho, in terms of his demeanor, impressed me as an insincere and unreliable witness. Accordingly, I find that Geho did not, as he testified, inform management that he was having problems with his driveline. This conclusion is bolstered by the fact that Geho, during the trip from July 7 through July 12, failed to indicate either directly or indirectly on his driver equipment reports that he was experiencing difficulty with the driveline. The record establishes that Geho, pursuant to standard operating procedure, maintained daily equipment reports during this trip and would have been reasonably expected to have noted on these reports the severe vibration and noise problem he claims to have experienced during this trip due to his problem with the driveline. His explanation for this omission—"more than likely with the phone calls and talking to [Clary] and [DeWitt] over the phone . . . I overlooked it on the write up sheet"—was not given in a persuasive manner.

On July 12, 1980, when Geho's tractor was disabled because of the twisted driveline, he phoned Maintenance Supervisor DeWitt and told him about the twisted driveline. DeWitt arranged for Geho to use another tractor to haul his trailer load of watermelons the rest of the way to Respondent's terminal and for a tow truck to tow the disabled tractor to the terminal. The disabled tractor and Geho arrived at the terminal the morning of July 14, 1980.

Geho testified that when he returned on July 14 Safety Director Clary told him he was discharged and that President Alger, in the presence of Clary and DeWitt, confirmed that he was fired. When Geho asked why he had been fired for the breakdown, Geho testified, Alger told him he could not afford him and his problems. Geho threatened to complain to the NLRB, the Department of Transportation, OSHA, and Nebraska's Department of Motor Carrier Safety.

Alger denied discharging Geho on July 14. He testified that it was July 15 when he told Geho that he was

[4] I note the unfair labor practice charge Geho filed in this case significantly fails to mention his alleged May 13, 1980, discharge. The charge only mentions the July 15, 1980, discharge. Geho failed to explain this omission.

discharged for abusing his equipment. Alger further testified that Geho lost his temper and yelled obscenities at him and told him he intended to go to every governmental agency he could think of in order to harass him and to cause him to go out of business. Geho refused to leave Alger's office and continued to yell obscenities. He left only after Alger phoned the police who escorted Geho from the premises.

As I have indicated *supra*, Geho, in terms of demeanor did not impress me as a sincere or reliable witness. Alger impressed me as a more credible witness. It is for this reason that I have credited Alger's version of this exit interview and his testimony that Geho was not discharged by him until July 15, 1980.[5]

On July 14 Alger inspected the disabled tractor Geho had driven. He discussed the twisted driveline with his shop personnel. They had never witnesses a twisted driveline comparable to this one and in order to determine what had caused it and to determine whether there was any damage done to the engine, Alger decided to have Richard Hauptman, the local representative for the manufacturer who built the tractor, and Maurice Smith, the local representative for the manufacturer who built the engine, inspect the disabled tractor and express their opinions. On other occasions Alger had called in outside experts to determine the cause of the damage to his equipment.

The same day, July 14, Smith and Hauptman separately inspected the disabled tractor and told Alger that they were of the opinion that the twisted driveline was not the result of normal wear and tear or of a failure of the shop personnel to conduct proper maintenance, but was a case of driver abuse. In effect they told Alger that it appeared that the driver of the tractor had attempted to slide back the trailer's fifth wheel with the trailer's brakes set and without dollying down the trailer so as to take the weight off of the fifth wheel and that the result was an extraordinary amount of torque to the driveline which caused it to be twisted.

Alger, based on the paperwork submitted to him by Geho, determined that at the time of the breakdown Geho was getting ready to cross the state line in Illinois which meant that he would have had to "shorten" his load in order to adjust the weight he was hauling in order to cross the scales as the state line. This is done by moving the trailer closer to the tractor by using the sliding fifth wheel. The proper way to shorten a load is to stop the tractor and use the manual crank to "dolly down" the landing gear. This process takes the weight of the trailer off the sliding fifth wheel. The driver then releases the pin on the air cylinder, which allows the pins in the sliding fifth wheel to be moved. The driver then would simply have to back his tractor closer to the trailer until the proper groove in the sliding fifth wheel was lined up. The cylinder would then be closed, the pin reinserted and the trailer put back into place on the fifth wheel. The improper method, which involves less work but a greater risk factor, is accomplished without taking the time to "dolly down" the trailer. The driver releases the air cylinder and the pin, revs the engine at high speed, and then pops the clutch in an attempt to force the sliding fifth wheel into position. This method produces a tremendous amount of torque and is difficult to accomplish, since the weight of the trailer is still resting on the sliding fifth wheel.

Based on the views of Smith and Hauptman, the fact that the breakdown occurred at a location where Geho would normally have been expected to shorten his load, and the failure of Geho's daily equipment reports to indicate that prior to the breakdown the driveline was vibrating or that he was otherwise having problems with the driveline, Alger decided that Geho's abuse of the equipment was responsible for the twisted driveline and, as described *supra*, on July 15 told him he was discharged for abusing his equipment.

b. *Discussion and analysis*

As evidenced by the Board's decision in *K & K Transportation Corp., Inc., supra*, Respondent is opposed to its drivers being represented by the Union and committed numerous unfair labor practices in an effort to discourage them from supporting the Union. The alleged discriminatee herein, Terry Geho, did not support the Union in its strike against Respondent and with Respondent's assistance circulated and filed a petition with the Board seeking to decertify the Union as the drivers' collective-bargaining representative. But, it is undisputed that on May 12, 1980, Geho informed Respondent President Alger that he would no longer assist Respondent's effort to get rid of the Union. The General Counsel apparently contends that this was Respondent's reason for discharging Geho. When Geho indicated he intended to cease helping Respondent to get rid of the Union his conduct in that respect was protected by Section 7 of the Act and if Respondent discharged him for this it violated the Act. I am of the opinion the General Counsel failed to make a *prima facie* showing that Geho's protected conduct was a motivating factor in Respondent's decision to discharge him. This conclusion is based on the following considerations.

(a) Geho's discharge took place several months after he informed Respondent's president he would no longer be a party to Respondent's attempt to get rid of the Union and the record fails to reveal that the timing of the discharge was otherwise significant.

(b) When the Union removed its picket lines on May 7, 1980, Respondent immediately reinstated all of the drivers who supported the Union's strike, who at that time asked for reinstatement, and there is no evidence or contention that Respondent thereafter refused to reinstate any of the strikers because of their activities on behalf of the Union or discharged an employee because of the employee's union activity.[6]

[5] I note that the unfair labor practice charge filed by Geho herein does not allege he was discharged on July 14, 1980, rather it alleges that Respondent, "since on or about July 15, 1980," discharged Geho.

[6] Respondent's refusal to reinstate striking employees Robert and Sharon Hudson and Lee Bridgman litigated in Case 17-CA-9853, *infra*, is not based on the theory that Respondent was discriminatorily motivated in denying them reinstatement, nor would the record support such a theory.

(c) As I have described *supra*, Respondent reasonably believed that the twisted driveline which disabled the truck Geho was driving was the result of Geho's abuse.

(d) The procedure used by Respondent to investigate the cause of the damage to Geho's truck—consulting outside experts—was used in past instances involving damaged equipment.[7]

(e) In the past Respondent had discharged several drivers who President Alger thought were guilty of abusing their equipment. There is no evidence that Alger has ever retained an employee who has abused equipment. Although there have been drivers whose trucks were damaged and who were not discharged, there is no evidence that these drivers were at fault or that Alger believed they were at fault.

It is for all of the foregoing reasons that I am persuaded that the General Counsel has failed to establish a *prima facie* case that Geho's protected conduct was a motivating factor in Respondent's decision to discharge him.

In any event, even if counsel for the General Counsel has made a *prima facie* showing that Geho's protected conduct was a motivating factor in Respondent's decision to discharge him, I am persuaded Respondent has demonstrated that Geho would have been discharged even in the absence of the protected conduct. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). As described *supra*, the driveline of the tractor which Geho was driving was damaged due to his negligence thereby disabling the tractor at a cost of $1,164. Respondent followed its usual procedure of calling in outside experts to assist it in determining the cause of the damage. When Respondent's investigation revealed that Geho's abuse of his equipment had resulted in the twisted driveline Geho was discharged for abusing his equipment. There is no evidence that Geho was treated disparately. Quite the opposite, the record establishes that Respondent's decision to discharge Geho was consistent with its practice of discharging employees who, like Geho, abused Respondent's equipment. It is for these reasons that I am persuaded that Respondent has demonstrated that Geho would have been discharged even in the absence of his protected conduct.

Based on the foregoing I shall recommend that this allegation be dismissed.

B. *Case 17-CB-9882*

1. On March 3, 1980, President Alger threaten to discharge Robert Vesper, Sr., if he testified in a Board proceeding against Respondent (complaint, par. 5(a))

As described *supra*, the Union's unfair labor practice charges filed in Cases 17-CA-9152 and 17-CA-9332 were heard before Administrative Law Judge Robbins on March 4 and 5, 1980. Administrative Law Judge Robbins, among other violations, found that Respondent violated Section 8(a)(1) of the Act by threatening in March 1980 to discharge employees if they testified adversely to Respondent in a Board proceeding. In support of this finding, which the Board affirmed, Administrative Law Judge Robbins made the following subsidiary findings (ALJ's Decision, pp. 18–19):

> Robert Vesper, Sr., was subpoenaed to appear and testify at the hearing herein. This summons made it impossible for him to leave on March 3 on an assigned trip. Robert Vesper, Jr., who drives with his father was not going on this trip because of illness. However, after his father was subpoenaed he decided to take the load. Vesper Jr. testified that on the morning of March 3, his father told him that Alger had telephoned and said they were having someone else take the load. Vesper Jr. then went to Respondent's facility and . . . asked for Alger. Alger had not arrived so Vesper Jr. waited for him for about an hour. When Alger arrived, Vesper Jr. asked him why he could not take the load. Alger said it was a two-man load. Vesper Jr. said that on the previous day, his father was given permission to take the load solo and accused Respondent of permitting his father to go solo to get him out of town. He then said just because you got something against my dad, why do I have to suffer for it. At this point, according to Vesper Jr., Alger slammed some papers on the desk and said, "any son-of-a-bitch that's going to court against me. I don't need them working for me." Alger further said that Vesper Sr. might as well go out and walk the picket line because he no longer worked for Alger. Vesper Jr. said, "Why do I have to suffer for that." Alger said, "I have nothing against you but as far as your father is concerned, he no longer works for me. But if you want to go out I'll get you a load." They then went to the dispatcher's office and Alger asked about a load for Vesper Jr. Vesper Jr. was not subpoenaed until March 4.

In making these findings, which were based on the testimony of Robert Vesper, Jr., Administrative Law Judge Robbins discredited Alger's version of his March 3 conversation with Vesper Jr. Administrative Law Judge Robbins also noted that Alger testified that on March 3, shortly after Alger spoke to Vesper Jr., that Vesper Sr. phoned and asked Alger whether he still had a job and indicated he was unable to handle his scheduled load for that day because his brother was critically ill. Administrative Law Judge Robbins further noted that Alger did not testify about his reply to Vesper Sr.

In the instant proceeding Vesper Sr. testified that he was served with a subpoena by the General Counsel to testify before Administrative Law Judge Robbins, but did not testify because he was unexpectedly forced to leave the area in order to visit his brother who had become terminally ill. Vesper Sr. also testified that on March 3, 1980, his son, Vesper Jr., advised him that Alger had stated that he did not want Vesper Sr. to testify in court and that Vesper Sr. would not have a job with Respondent if he testified. Vesper Sr. testified that when he heard this he immediately phoned Alger on

[7] Alger credibly testified that he failed to question Geho about Geho's version of the cause of the twisted driveline because, based on Alger's investigation described *supra*, Alger thought it was very clear what had happened.

March 3 and asked whether he had heard right, that if he testified in court he would not have a job. Alger, according to Vesper Sr., replied, "That's right . . . if you want to be on the other side of the fence that is where you should be, on the other side of the fence." Vesper Sr. told Alger that he had planned on appearing in court to testify but that he had to visit his brother who was ill in South Dakota, but if it were possible intended to return to testify. Alger did not controvert Vesper Sr.'s aforesaid testimony.

The complaint alleges that on March 3, 1980, Respondent, through President Alger, threatened its employees with discharge if they testified adversely to Respondent in a Board proceeding. In support of this allegation the counsel for the General Counsel called Vesper Sr. who, as I have described above, testified without contradiction that on March 3, 1980, President Alger threatened him with discharge if he testified for the General Counsel against Respondent in the unfair labor practice proceeding being heard before the Administrative Law Judge Robbins.

I am of the opinion that this allegation is governed by the principles of *Peyton Packing Company, Inc.*, 129 NLRB 1358 (1961), and *Jefferson Chemical Company, Inc.*, 200 NLRB 992 (1972), which dictate that there be but a single hearing on all outstanding violations of the Act reasonably known to the General Counsel involving the same Respondent, for to act otherwise results in unnecessary harassment of respondents. Here, as described in detail *supra*, the instant allegation is inextricably intertwined with one of the allegations litigated in the earlier unfair labor practice proceeding heard before the Administrative Law Judge Robbins and found to have been an unfair labor practice and is a part and parcel of that litigation. As a matter of fact the violation alleged herein adds nothing to the remedy provided by the Board's order in that case. It is likewise clear that the counsel for the General Counsel should have reasonably known of the violation alleged herein at the time of the litigation before Administrative Law Judge Robbins and should have litigated it aa a part of that litigation. The fact that Vesper Sr. was unavailable to testify before Administrative Law Judge Robbins on March 3 and 4, 1980, due to the illness of his brother, does not excuse the General Counsel's failure to ask for a continuance. It is for these reasons that I shall recommend that this allegation be dismissed in its entirety.[8]

2. On August 20, 1980, President Alger allegedly threatened employees with reprisals for participating in an investigation of unfair labor practice charges and for engaging in union activities and solicited employees to send a letter to the Board stating they would not participate in the Board's investigation of those charges (complaint, pars. 5(b) and (c))

On July 15, 1980, as described in detail *supra*, Respondent discharged employee Terry Geho. He filed unfair labor practice charges with the Board on August 4, 1980, alleging that Respondent violated the Act by discharging him.

During the time material herein Respondent employed Robert Vesper, Sr., his wife, Eva Vesper, and their son Robert Vesper, Jr., as truckdrivers. As described *infra*, on August 1, 1980, Respondent discharged Vesper Sr. and his wife. During the week of August 4, 1980, the Vespers spoke to an agent of the Board in order to determine their rights under the Act. On August 27, 1980, Eva Vesper filed the unfair labor practice charge in this case alleging that Respondent violated the Act by discharging herself and her husband.

On August 20, 1980, Eva Vesper phoned President Alger to talk about a problem her son Vesper Jr. was having with his driver's license which had resulted in his being temporarily unable to work. She testified that, after discussing her son's situation with Alger that Alger abruptly changed the topic and stated that her son had Geho to thank for his problems, that Geho had been shooting off his mouth to different government agencies, that Alger had nothing against the Vespers personally but if they associated with Geho in what he was doing that they were buying themselves a lot of problems. He explained that he had made rules to get rid of Geho and if he changed them for the benefit of the Vespers he would have every government agency in the country "down his back." Eva Vesper also testified that Alger said he had heard that "we" had met with Geho and a representative of the Labor Board at the Vespers' home. Eva Vesper acknowledged that this was true, but told Alger she did not agree with many of Geho's tactics and with a lot of the things Geho had done. Alger, according to Vesper, replied that if she did not want any part of Geho she could write a registered letter to the Labor Board stating she wanted no part of the charges that were being filed, with a copy to Alger, and that it would be in her favor to write such a letter. Eva Vesper also testified that during the conversation she told Alger that he knew her husband did not abuse his equipment. In reply Alger is supposed to have told Mrs. Vesper that "he never believed for one minute that [her husband] abused his equipment but . . . sometimes you have to go to extreme measures to get rid of a fool." Mrs. Vesper did not place this last exchange in context.

Alger's version of his August 20 conversation with Eva Vesper differs substantially. He testified that the conversation concerned Mrs. Vesper's son, that Geho's name was not mentioned or discussed and that the only time the Labor Board was mentioned was when Eva Vesper told him that Board agents had visited her and were in effect pressing her to sign an affidavit. Mrs. Vesper told Alger she did not want to be involved and did not know what to do and asked Alger's advice. Alger testified he told her if she did not want to be involved that she should write a registered letter to the Board and that probably the Board agents would accept her decision and stop bothering her.

Eva Vesper, while testifying as described above about her August 20, 1980, phone conversation with Alger, did not appear to be a sincere or reliable witness in terms of

[8] As I stated during the hearing herein, I shall consider Alger's March 3, 1980, statement to Vesper Sr. as background material, insofar as it sheds light on the other unfair labor practices alleged in this complaint.

her demeanor, especially when she testified that Alger in effect told her that he had resorted to "extreme measures" to get rid of her husband whom he characterized as a "fool." Alger impressed me as the more credible witness in terms of demeanor, so I have accepted his version of this conversation. I therefore shall recommend that these allegations be dismissed.

3. On September 12, 1980, President Alger allegedly refused to permit Eva Vesper to visit Respondent's premises because she filed the instant unfair labor practice charge (complaint, par. 5(d))

As described *infra*, on August 1, 1980, Respondent discharged Robert Vesper, Sr., and his wife, Eva Vesper. On August 27, 1980, Eva Vesper filed the unfair labor practice charge in this case alleging that the discharges were illegally motivated. On or about September 7, 1980, as described *infra*, Respondent reinstated Vesper Sr.

Vesper Sr. testified that on September 12, 1980, his wife, Eva, came to Respondent's terminal to give him a ride home and while he completed his usual end-of-the-trip paperwork she waited in the terminal for him. Prior to leaving the terminal with his wife, Vesper Sr. was called into Alger's office.[9] Alger spoke to him about his wife.

Vesper Sr. initially testified that Alger told him that his wife was "harassing people" in the terminal and for this reason would no longer be allowed on the Employer's property. Counsel for the General Counsel then asked Vesper Sr. to repeat Alger's explanation for refusing to allow Eva Vesper on the Company's property. Vesper Sr. now testified, "because she had filed charges with the NLRB [and] she was harassing the mechanics and this and that."

Alger testified that on the day in question he observed Eva Vesper sitting with several drivers and overheard her expressing derogatory remarks about the Company's shop and its mechanics. Eva was saying that Respondent did not employ a single qualified mechanic and was operating a bunch of junk, referring to Respondent's fleet of trucks. Upon hearing Eva Vesper make these remarks, Alger testified he summoned Vesper Sr. into his office and told him he could not allow Vesper Sr.'s wife to come onto his property and degrade his workers, that she did not work there anymore, and that he did not want her on his property. He specifically denied telling Vesper Sr. that his reason for refusing to allow Eva Vesper on company property was that she had filed a charge with the Board.

In terms of his demeanor Alger impressed me as a more credible witness than Robert Vesper, Sr. Accordingly, I shall recommend that this allegation be dismissed in its entirety.

[9] Vesper Sr. testified he thought that Safety Director Clary was present in the office.

4. On August 1, 1980, Respondent discharged Robert Vesper, Sr., and Eva Vesper allegedly because they gave testimony to the Board or Respondent thought they did or intended to do so (complaint, par. 6)

a. *The evidence*

Robert Vesper, Sr., began working for Respondent in May 1977, while his wife, Eva Vesper, began working there in March 1980. During Mrs. Vesper's employment they worked together as team drivers. Vesper Sr. was Respondent's most senior driver.

On July 24, 1980, the Vespers were driving through Arizona on their way to Texas. Early in the morning between 2 and 4 a.m. Eva Vesper was driving while Vesper Sr. was asleep in the sleeper portion of the tractor. Eva Vesper testified that when she approached the agricultural check point at the Arizona-California state line she slowed down and as she shifted gears heard a "thump" and was unable to move the truck. At this point Vesper Sr. awoke and climbed into the driver's seat but was unable to put the truck into gear or otherwise move it. He got out and discovered that the tractor's power divider was damaged.

Vesper Sr. arranged for the truck to be towed to a yard in the vicinity until he could get instructions from his superiors. He contacted Dispatcher Hutchison and Shop Foreman Holt and told them that the tractor was inoperative because the power divider had been damaged and described the damage. He also told them that he had been asleep at the time of the breakdown but that his wife, who was driving, had told him that as she slowed down while approaching the port of entry she heard a "klunk" when she shifted gears and that at this point was unable to move the tractor any further.

Respondent sent a replacement tractor to the Vespers so they could complete their trip to Texas. A wrecker was also dispatched which towed the disabled tractor back to Respondent's yard. It cost Respondent approximately $2,000 in parts to repair the tractor and the total expense to Respondent of the breakdown was $3,562.

The disabled tractor was brought back to Respondent's yard on or about July 27, 1980, at which time Alger instructed Safety Director Clary not to dispatch the Vespers until Alger learned more about the cause of the damage to the power divider. Alger arranged for Richard Hauptman, a representative of the manufacturer of the tractor, to look at the damaged power divider. Hauptman viewed it the week of July 28. As I have indicated in connection with Geho's discharge, *supra*, it is not unusual for Alger to get advice from outside experts to determine the cause of mechanical breakdowns.

Hauptman in effect informed Alger that the power divider had been damaged because of a severe shock which is usually caused by the driver popping the clutch or not gearing down properly. Hauptman specifically discounted normal wear and tear or the loss of oil as having caused the damage to the power divider.

Upon receipt of Hauptman's opinion Alger notified Safety Director Clary to inform the Vespers that they

were being terminated due to driver negligence.[10] On August 1, 1980, Clary informed Vesper Sr. that he and his wife had been terminated because Alger did not believe their version of the way the power divider was damaged. Previously when the Vespers had returned from their trip on July 29, 1980, they had asked Clary if he wanted to know what had happened in connection with the disabled tractor. Clary indicated he was not interested in hearing their story. It is undisputed that other than the description of what happened given by Vesper Sr. to the dispatcher and the shop foreman, shortly after the tractor was disabled, that supervision did not otherwise question the Vespers prior to their discharge about their version of the breakdown.

On August 1, 1980, as soon as Eva Vesper learned that she and her husband had been terminated, she phoned Alger and arranged to meet with him on August 6, 1980. They met on that date in the presence of Dispatcher Hutchison, Shop Foreman Holt, and Maintenance Supervisor DeWitt. Alger indicated that he felt the tractor must have been damaged while Eva Vesper was backing it up. Vesper denied this. She informed Alger that the breakdown took place when she shifted gears while slowing down upon entering the port of entry to Arizona at which time she heard a "thump" and was then unable to move the tractor. DeWitt stated he did not believe the damage to the power divider could have been caused in this manner. Holt stated he felt it was possible that when Vesper shifted she might have shifted into the wrong gear. Alger stated it was company policy that if anyone damaged a tractor, such as the Vespers had done, they were automatically terminated. Eva Vesper pointed out that this was not included among the Company's written rules. Alger stated that since he was the president he was not limited solely to the Company's printed rules, but could make other rules. Eva Vesper stated that her husband was the Company's most senior driver and had a good driving record and had never abused equipment. Alger stated past records were not relevant in this case because as members of a team the Vespers were jointly responsible for the truck. The meeting ended with Vesper asking DeWitt why, after telling her son Vesper Jr. that she was not responsible for what happened, he was now indicating she was at fault. DeWitt denied having told Vesper Jr. that she was not at fault.[11]

Early in September 1980 when Vesper phoned Alger and asked for a job reference, Alger invited him to come to the Company's office and talk with Alger which Vesper did that same day. During this meeting Vesper Sr. indicated he wanted to return to work for Respondent and asked if this were possible. Alger told him that if he and his wife acknowledged that his wife was responsible for the damage to the tractor and that Vesper Sr. was without responsibility, he would consider reinstating him. Thereafter, on or about September 4, 1980, Vesper Sr. presented to Alger notarized statements signed by his wife and himself which in substance stated that at the time of the damage to the tractor, Vesper Sr.'s wife was driving and Vesper Sr. was asleep in the tractor's sleeper and that his knowledge of the incident was limited to what his wife had told him. Upon receipt of these statements Alger reinstated Vesper Sr. who was dispatched on September 7, 1980, with his son, Vesper Jr., as a team.

b. *Discussion and analysis*

The complaint alleges that the Vespers were discharged in violation of Section 8(a)(1) and (4) of the Act, because "[Vesper Sr.] had given testimony to the Board in the form of affidavit, because Respondent believed the both [Eva Vesper and Vesper Sr.] had given testimony to the Board in the form of affidavits or verbal statements, and because [Vesper Sr.] expressed an intention to testify at an unfair labor practice hearing conducted by the Board in Cases 17-CA-9152 and 17-CA-9332 on March 4 and 5, 1980." I am of the opinion that this allegation should be dismissed in its entirety because the General Counsel has failed to establish a *prima facie* case that the protected activity alleged in the complaint was a motivating factor in Respondent's decision to discharge the Vespers.

There is no credible evidence that when Respondent discharged the Vespers it knew or suspected either one had spoken to a Board agent about their discharges or were assisting the Board in its investigation of Geho's unfair labor practice charge in Case 17-CA-9826. The only evidence of protected concerted activity engaged in by any one of the Vespers which is alleged in the complaint to have contributed to their discharges, which Respondent knew about, was Vesper Sr.'s intention to testify against Respondent in March 1980 in Cases 17-CA-9152 and 17-CA-9332. As has been described in detail *supra*, Vesper Sr. was subpoenaed by the General Counsel to testify in that proceeding and when Respondent learned of this its president, Alger, on March 3, 1980, threatened him with discharge if he complied with the subpoena. Vesper Sr. never did testify inasmuch as he had to leave the area due to an illness in his family, but nonetheless informed Alger he intended to make every effort to testify against Respondent despite Alger's threat to discharge him. This evidence is not sufficient to warrant an inference that 4 months later Alger, in discharging Vesper Sr. and Eva Vesper, was motivated by his

[10] Clary played no part in the decision to discharge the Vespers. He was not consulted by Alger who made the decision. Clary testified that on August 1, 1980, Alger notified him that the Vespers were being discharged for abusing equipment at which time Clary filled out an "Employee Warning Record," a record maintained by Respondent for employees who leave its employ. This record is for future use, if, for example, another employer asks for a reference. Clary credibly testified that on August 1 he recorded that the Vespers were discharged for "carelessness" because they were "hard on equipment." Clary further credibly testified that thereafter he overheard Eva Vesper speaking in a derogatory manner about the Company to drivers and because of this also noted on the aforesaid record that the Vespers had a bad attitude toward the Company. He testified in effect that this last notation was inadvertent insofar as it can be construed as referring to Vesper Sr., but should have referred only to Eva Vesper and testified he added it to the record for future reference.

[11] The record establishes that DeWitt did not inform Vesper Jr. that his mother was not responsible for the damage to the power divider. Rather, Vesper Jr. testified that on July 29, 1980, DeWitt, after viewing the damaged tractor informed Vesper Jr., "it looked like it had just run out of oil and got hot, [but] he could not tell right then, that the would have to check it out [and] said they had some experts coming in . . . to look at it."

hostility toward Vesper Sr. for indicating that he intended to testify against Respondent. Alger not only continued to employ Vesper Sr. but, soon after making the aforesaid threat to fire Vesper Sr., he hired Vesper Sr.'s wife Eva Vesper to work with Vesper Sr. as a team. This is hardly the conduct of someone who was intent on punishing Vesper Sr. Moreover, Vesper Jr., who despite Alger's threat of discharge went ahead and testified on March 4, 1980, before Administrative Law Judge Robbins in the prior litigation, remained employed by Respondent on the date of the hearing in this case and there is no evidence or contention that he has ever been discriminated against by Respondent. Also, the timing of the Vespers' discharge is not significant and inasmuch as it took place long after Alger's threat to discharge Vesper Sr., it militates against any inference of illegal motivation, especially since in the interim Alger hired Vesper Sr.'s wife to work with him as a team.

Also significant in evaluating Respondent's motivation is the fact that Alger's decision to discharge the Vespers was made only after he had received the opinion of an outside expert that the damage to the tractor's power divider which had cost Respondent $3,562 was the result of the driver abusing the equipment. In the past Alger has discharged other drivers for abusing equipment or imposed a lesser penalty for this offense other than discharge. And, although Vesper Sr. was not driving the tractor at the time of the breakdown, Alger's decision to terminate him, along with his wife, was consistent with Respondent's policy of holding both members of a driving team liable for the abuse of equipment absent a statement from both members absolving one of the members from responsibility. When the Vespers, approximately 1 month after their discharges submitted such statements to Alger absolving Vesper Sr. from responsibility, Vesper, Sr. was promptly reinstated.

It is for all of the aforesaid reasons that I am of the opinion that the record does not establish a *prima facie* case that the protected activity alleged in the complaint was a motivating factor in Respondent's decision to discharge the Vespers. In so concluding I have taken into consideration the fact that previously when Vesper Sr. was on a team whose truck was involved in an accident that he was allowed to drive pending the Company's investigation as to who was responsible, whereas in the instant case he was discharged prior to any investigation of the respective responsibilities of the team members involved. Nonetheless, in view of the overwhelming evidence described above which negates any inference of illegal motivation, this deviation from company policy is insufficient in the circumstances to establish a *prima facie* case of illegal motivation as alleged in the complaint.

Based on the foregoing, I shall recommend that the allegation herein be dismissed in its entirety.

C. *Case 17-CA-9853*

1. The Union's strike against Respondent was caused by Respondent's unfair labor practices (complaint, par. 5)

The Union was certified by the Board on November 14, 1978, as the exclusive bargaining representative of Respondent's employees in an appropriate unit and negotiations for a collective-bargaining agreement commenced on December 22, 1978, and continued through November 19, 1979, without success. In *K & K Transportation Corp., Inc., supra*, as I have described *infra*, the Board found that Respondent following the Union's certification and contemporaneous with the negotiation meetings in the ensuing year engaged in numerous unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. In connection with the collective-bargaining negotiations the Board concluded that Respondent had refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act inasmuch as it was engaged in "surface bargaining" without any intent to reach an agreement.

On November 3, 1979, the Union called a strike against Respondent which was supported by a substantial number of the unit employees. On November 3, prior to the strike, a union meeting was held at which time the employees voted to strike. Prior to the vote the Union Secretary-Treasurer McFarland discussed the reasons for the strike. McFarland explained what had been going on during the contract negotiations, informed the employees that the Union had been unable to secure an agreement with Respondent because in the Union's opinion Respondent was not interested in reaching an agreement but was simply engaging in surface bargaining and that the Union had filed an unfair labor practice charge against Respondent and felt that the employees were in a position to conduct an unfair labor practice strike.[12] The employees then voted to strike and the strike began the same day. The record shows that even prior to November 3 that the unit employees had expressed dissatisfaction with the manner in which Respondent was bargaining with the Union. Sharon Hudson, an employee, credibly testified that one of the grievances raised by the employees prior to November 3, 1979, in discussions among themselves, was their belief that Respondent did not intend to negotiate a collective-bargaining agreement with the Union and that it would be necessary for the employees to strike. When the Union in fact commenced its strike on November 3 the picket signs carried by the strikers identified the strike as being directed specifically toward Respondent's unfair labor practices. In view of the foregoing circumstances taken in their totality, I am persuaded that the causal connection between Respondent's refusal to bargain in good faith by engaging in surface bargaining and the strike is clear. Accordingly, I believe, and so find, that the strike, from its inception, was an unfair labor practice strike.[13] See *C & E Stores, Inc.*,

[12] McFarland also mentioned that Respondent had been interrogating employees about their union activities.

[13] The law is settled that if an unfair labor practice is a "contributing cause" of a strike or "had anything to do with causing the strike" it was an unfair labor practice strike. *Larand Leisurelies* v. *N.L.R.B.*, 523 F.2d 814, 820 (6th Cir. 1975); *General Drivers & Helpers Local 662 [Rice Lakes Creamery Company]* v. *N.L.R.B.*, 302 F.2d 908, 911 (D.C. Cir. 1962). In the instant case it is clear that Respondent's refusal to bargain in good faith with the Union was at the very least a contributing cause of the strike. Respondent's assertion that because in November 1979 agreement was reached by the parties on certain proposals advanced by Respondent that at that point the strike was converted to an economic strike, is with-

Continued

et al., 221 NLRB 1321 (1976); *Wittock Supply Company*, 171 NLRB 201, 203 (1968).

In finding that the Union's strike was an unfair labor practice strike, as alleged in the complaint herein, I have rejected Respondent's contention that under the Board's decisions in *Peyton Packing Company, Inc.*, 129 NLRB 1358 (1961), and *Jefferson Chemical Company, Inc., supra*, the General Counsel was foreclosed from litigating the nature of the strike, since at the time of the prior unfair labor practice proceeding against Respondent in Cases 17-CA-9152 and 17-CA-9332 the General Counsel knew that the Union was conducting a strike against Respondent and, therefore, could and should have litigated the nature of the strike in the prior litigation. I am not persuaded *Peyton Packing* and *Jefferson Chemical* are applicable to the present situation. In those cases the Board held that roughly concurrent unfair labor practices must be litigated in a single proceeding, so as to prevent unnecessary harassment of respondents. The instant situation does not involve the litigation of concurrent unfair labor practices. On the date of the prior unfair labor practice proceeding Respondent was not charged with a refusal to reinstate any of the strikers nor was it charged with any other violation of the Act to which the nature of the strike had any relevance. In fact at that time Respondent had not refused to reinstate any striker. Nor is there evidence that the General Counsel should have reasonably known that such an issue would arise in the future.[14] Although it may have been better practice for the General Counsel to have litigated the nature of the strike in the prior proceeding (see *Wittock Supply Company*, 171 NLRB 201, 202 (1968)), I am not persuaded that, under the circumstances of this case, the General Counsel abused his discretion by failing to do so. I therefore reject Respondent's argument that the General Counsel was foreclosed from litigating the nature of the strike.

2. Respondent refuses to reinstate striking employees Robert Hudson, Sharon Hudson, and Lee Bridgmon, Jr. (complaint, par. 6)

a. *The evidence*

On November 3, 1979, the Union called a strike against Respondent which was supported by a substantial number of unit employees. As I have found *supra*, the strike was an unfair labor practice strike. In conjunction with the strike the employees picketed Respondent's facility from November 3, 1979, through May 7, 1980. On May 7, 1980, the Union discontinued the picketing, but has never ended the strike and as of the date of the hearing in this case the Union still considered that it was on strike against Respondent. During the period of the picketing Respondent did not replace any of the strikers. Also the record reveals that Respondent reinstated all of the strikers who sought reinstatement during the period when there was picketing and immediately following the cessation of the picketing. The only strikers whose reemployment rights are in issue in this case are Robert and Sharon Hudson and Lee Bridgmon, Jr.

The Hudsons and Bridgmon were employed by Respondent as truckdrivers. They ceased work when the strike commenced, in support of the strike, and for about 3 or 4 weeks picketed. They ceased picketing because they lived a substantial distance from Respondent's facility and were unable to afford the expense. Almost immediately after they stopped picketing the Hudsons began work as truckdrivers for Midwest Coast Transport and worked for this employer from December 1979 until the end of July 1980. Likewise the record reveals Bridgmon went to work as a driver for Midwest Coast Transport after he stopped picketing and at the time he testified in this proceeding had been working continuously for that company.

On November 25, 1979, Joseph Roy, a driver for Respondent, who was hauling a full load, pulled his truck into Herby's Truck Stop in Council Bluffs, Iowa, in order to scale the load. He went inside to get some change for the scales. He testified that as he came out of Herby's that he observed a man whom he recognized as Robert Hudson leaving the cab of his tractor and running to a white an blue Ford automobile, which he recognized as Hudson's car. There was lady in the car who Roy testified he recognized as Robert Hudson's wife, Sharon.[15] Roy also testified that, after checking the tractor and trailer for visible damage and finding nothing wrong, he started to drive away from the truck stop, but as he did, the trailer dropped from the tractor and fell on its nose onto the scale, damaging the trailer's landing gear. Roy testified that the reason the trailer fell down was that the king pin on the fifth wheel of the tractor had been pulled, presumably by Robert Hudson, thereby disconnecting the tractor from the trailer. The damage could have been much worse, according to Roy, because the trailer could have separated after he had driven out onto the highway and endangered other motorists.[16]

Thereafter, on November 25, 1979, Roy reported what happened to his truck to management and a tow truck was dispatched to remedy the situation. Respondent President Alger was notified about what had occurred and after Roy returned from his trip Alger spoke to him personally about the matter. Roy at that time told Alger

out merit. The Board's holding in Cases 17-CA-9152 and 17-CA-9332 that Respondent was engaged in illegal surface bargaining was arrived at despite the fact that the parties had reached agreement on certain bargaining proposals advanced by Respondent. Nevertheless, the Board concluded that Respondent's bargaining conduct for the entire period constituted illegal surface bargaining.

[14] The charge in the instant case was filed by an individual on August 12, 1980, after the Administrative Law Judge issued her Decision in the prior proceeding. Also, Respondent's refusal to reinstate strikers Robert and Sharon Hudson took place after the issuance of the Administrative Law Judge's Decision in the prior proceeding.

[15] Roy knew Mr. and Mrs. Hudson and knew they drove a blue and white Ford auto because he had worked with the Hudsons for several months prior to the strike.

[16] In testifying about what he observed and what happened at Herby's Truck Stop on November 2, 1979, Roy, in terms of demeanor and the manner in which he presented his testimony, impressed me as a sincere and reliable witness and I have credited his testimony in its entirety. Robert and Sharon Hudson specifically denied that the incident described by Roy took place or that Robert Hudson sabatoged the truck. However, Roy impressed me as a more credible witness than the Hudsons. I also reject Robert Hudson's testimony that it is impossible to remove the pin from the fifth wheel by simply bending down and reaching under the truck. This testimony was contradicted by Roy and President Alger, who impressed me as more credible witnesses.

he did not want to get personally involved as he was afraid of reprisals from the strikers. In view of this Alger let the matter rest, but on November 26, 1979, based on the information Roy had given management Alger wrote the following "Work Stoppage And Equipment . . . Damage Report":

> Bob Hudson pulled fifth wheel pin on trailer driven by Joe Roy when he was getting change to pay for scaling. Bob Hudson was seen running from trailer. Everything was checked out except the fifth wheel pin. When Joe Roy pulled up trailer dropped on scale—3 hour delay and 1 day lay over and cost of $104.50 to pick trailer up to height to drive under. Wife was seen at Herby's also.

Alger on the same date, November 26, 1979, also informed his lawyer about what had taken place and his lawyer apparently phoned the Union's business representative and spoke to him about the matter and confirmed their conversation by letter to the union representative dated November 26, 1979, as follows:

> As I explained to you in our telephone conversation, it has come to our attention that an incident occurred at Herby's in Council Bluffs, Iowa on Sunday, November 25, 1979, when one of the company's drivers pulled up to the scale to weigh his load. He left the tractor and upon returning to it, he saw an individual running away from it and get into a blue car. He believes that this individual was Robert Hudson . . . . He then discovered a short time later that the fifth wheel had been pulled. I would appreciate your checking into this incident and doing what you can to prevent a recurrance of such incidents in the future.

Robert Hudson, Sharon Hudson, and Lee Bridgmon, Jr., testified that during the period from April 1980 through June 1980 Robert Hudson asked Respondent President Alger to reinstate them. Robert Hudson testified that Alger turned down these requests. Alger testified that Robert Hudson made no such requests for reinstatement during this time period. The testimony of the Hudsons, Bridgmon, and Alger pertaining to this subject is set forth and evaluated herein.

Robert Hudson testified he phoned Alger in April 1980 and told him that he and his wife were ready to return to work, but Alger told him "this thing has not been settled yet" and told him to call back in 30 days. Sharon Hudson testified that she heard her husband tell Alger that "Sharon and I are ready to go back to work. We heard the strike was over."

Robert Hudson testified that in May 1980, 30 days after the above-described conversation, he phoned Alger again and asked whether Alger was ready to put Sharon and himself back to work and also asked Alger, "what about Lee Bridgmon." Alger answered that Administrative Law Judge Robbins had not issued her decision yet and that Alger was not sure whether he was going to put Robert Hudson back to work and that he should call back later. Sharon Hudson testified that she heard her husband say, "It's been 30 days Everett, is the strike settled yet? Sharon and I are still anxious to go back to work." Sharon Hudson failed to corroborate her husband's testimony that he mentioned Bridgmon's name.

Robert Hudson testified he phoned Alger in June 1980 and asked if Alger intended to reinstate his wife, himself, and Bridgmon as they were ready to return to work. Alger answered, according to Hudson, that "we had caused him quite a bit of aggravation on the picket line and that he was not sure he was going to put us back to work." When Hudson told Alger he had to put them back to work, Alger hung up. As a rebuttal witness Robert Hudson testified that during this conversation in response to his above-described request for reinstatement, Alger replied, "I am pretty sure you guys damaged some of [the] equipment," whereupon Hudson answered, "you know better than that" and hung up. Sharon Hudson testified that this phone call was placed by her husband in the presence of herself and Bridgmon and that her husband told Alger that he had heard "this has been settled" and asked why Alger was not putting the Hudsons and Bridgmon back to work when other strikers had been reinstated. Lee Bridgmon testified that he was present at the Hudson's home early in June 1980 when Robert Hudson placed this call and that he heard Robert Hudson ask if Alger were going to put the Hudsons back to work and that Robert Hudson also told Alger that "Lee Bridgmon is ready to go to work too." Bridgmon also testified he heard Hudson say, "we did not do something to the truck." It is undisputed that the affidavit which Bridgmon submitted to the Board on August 20, 1980, in support of the charge filed in this case omits any mention of Hudson's June 1980 conversation with Alger and does not state that Hudson ever indicated to Alger that Bridgmon wanted to return to work for Respondent.

Alger testified that prior to Robert Hudson's August 12, 1980, phone call, *infra*, that Hudson in 1980 phoned him twice about returning to work and that during each of these conversations indicated that he and his wife were ready to return to work provided that the strike was over. Alger informed Hudson that the strike was still in progress,[17] whereupon Hudson stated that he and his wife were not interested in returning to work until the Union ended its strike. Alger further testified that Bridgmon's name was not mentioned in either of these conversations.

In terms of his demeanor Alger impressed me as a more credible witness than the Hudsons or Bridgmon, who did not in terms of their demeanor impress me as credible witnesses. I therefore shall credit Alger's version of the aforesaid conversations. Also I note that Robert Hudson's testimony that he asked Alger in May 1980 to reinstate Bridgmon was not corroborated by Hudson's wife and that Bridgmon in the affidavit he submitted to the Board significantly failed to mention the June 1980 conversation between Robert Hudson and Alger where Hudson once again supposedly asked Alger to reinstate Bridgmon.

[17] As I have indicated *supra*, although picketing ended May 7, 1980, the Union has not ended its strike against Respondent.

It is undisputed that on or about August 12, 1980, Robert Hudson phoned Alger about returning to work. There is a conflict about what was stated during this conversation. Robert Hudson testified that he placed the phone call in the presence of his wife and told Alger that his wife, himself, and Bridgmon were ready to return to work and that Alger replied that he was not putting them back to work. Hudson told Alger he intended to file an unfair labor practice charge with the NLRB. Sharon Hudson testified her husband told Alger, "we know the strike has been settled" and that Alger had to put the Hudsons and Bridgmon back to work, that Alger knew they had good driving records and had no reason not to reinstate them. Alger testified that Robert Hudson indicated that both Robert Hudson and his wife Sharon Hudson wanted to return to work. Alger further testified that his response to this request was that Robert Hudson would not be allowed to return to work, that he informed Robert Hudson that while on strike Robert Hudson had been involved in a situation which could have resulted in a disastrous accident. Hudson asked what Alger was talking about. Alger told him that he thought Robert Hudson had pulled the fifth wheel pin on one of the Company's trucks at Herby's Truck Stop. Hudson replied, "that was during the strike, so anything goes at that time." Alger told him that what he had done was illegal. Hudson threatened to file a charge with the NLRB if he did not get his job back. Alger also testified that Bridgmon's name was not mentioned during this conversation. I credit Alger's version of this conversation inasmuch as in terms of demeanor he impressed me as a more credible and reliable witness than the Hudsons, who did not, in terms of demeanor, impress me as credible witnesses.

On August 17, 1980, Bridgmon phoned Ray Clary, Respondent's safety director. Bridgmon testified he asked Clary "what had been going on out there and I told [Clary] that charges had been filed against [Respondent] with the Board. I asked [Clary] if he was going to put anybody back to work" or used words which were "something similar to that." Clary answered that "he did not know what was going on or what was happening." In the affidavit he submitted to the Board on August 20, 1980, Bridgmon stated that when he spoke to Clary on August 17, "I asked if there was anything happening between the Union and K & K. Clary said no . . . I said OK. *I did not ask to go back to work.*" (Emphasis supplied.)

2. Discussion and analysis

I agree with Respondent's contention that the complaint herein insofar as it alleges an unlawful refusal to reinstate striker Bridgmon should be dismissed because of the lack of evidence that Bridgmon ever made an unconditional request for reinstatement. As I have found *supra*, Robert Hudson did not ask Respondent's president, Alger, to reinstate Bridgmon. And, as Bridgmon admitted to the Board in his prehearing affidavit, in his sole conversation with a representative of management, Bridgmon "did not ask to go back to work." I therefore shall recommend that the complaint herein be dismissed insofar as it alleges Respondent violated Section 8(a)(1) and (3) of the Act by failing and refusing to reinstate Bridgmon.

I disagree with Respondent's contention that the Hudsons lost their status as strikers for purposes of reinstatement because they abandoned interest in their struck jobs. In support of this contention Respondent points to the fact that the Hudsons stopped picketing after approximately 4 weeks, that shortly thereafter they went to work for another trucking company and the Union stopped paying them strike benefits, and the lack of evidence that the Hudsons kept in touch with the Union about the progress of the strike.

In dealing with an analogous situation wherein several unfair labor practice strikers resigned in order to accept other jobs during a strike, the Board in *S & M Manufacturing Company*, 165 NLRB 663 (1967), stated that such action "does not automatically eliminate (the striker) as a striking employee, absent unequivocal evidence of intent to permanently sever (the striker's) employment relationship . . . ." 165 NLRB at 663. See also *Mastro Plastics Corporation and French-American Reeds Manufacturing Co., Inc.*, 136 NLRB 1342, 1349–50 (1962); *Cornwell Company, Inc.*, 171 NLRB 342, 348 (1968). And with respect to determining an economic strike's eligibility to vote in an election, the Board has set out certain standards pertinent here. The Board has found a presumption of the striker's eligibility and has stated:

> To rebut the presumption, the party challenging his vote must affirmatively show by objective evidence that he has abandoned his interest in his struck job. The nature of the evidence which may rebut the presumption will be determined on a case-by-case basis. However, acceptance of other employment, even without informing the new employer that only temporary employment is sought, will not of itself be evidence of abandonment of the struck job so as to render the economic striker ineligible to vote. *Pacific Tile and Porcelain Company*, 137 NLRB 1358, 1359–1360 (1962). Accord: *Bio-Science; Laboratories* v. *N.L.R.B.*, 93 LRRM 2154, 2156–2157 (9th Cir. 1976).

In the instant case the record does not establish that the Hudsons abandoned an interest in their struck jobs. They ceased picketing because of financial problems and there is no evidence that the compensation and benefits they received from Midwest Trucking were substantially equivalent to those they derived from their previous positions with Respondent. There is no evidence that they informed either Respondent or Midwest Trucking that they intended their employment with Midwest to be permanent or that they no longer desired to work for Respondent. Quite the opposite, as I have described *supra*, during the time material herein the Hudsons, through Robert Hudson, informed President Alger that they were interested in continuing their employment with Respondent, but when Alger informed them that the Union had not ended its strike, told Alger they were unwilling to return to work until the Union ended its strike. Under these circumstances I reject Respondent's argument that the Hudsons abandoned their interest in their struck jobs.

On or about August 12, 1980, as I have found *supra*, unfair labor practice strikers Robert and Sharon Hudson, through Robert Hudson, told Respondent President Alger that they wanted to return to work. Alger replied that Robert Hudson was not eligible for reinstatement because Alger thought he was responsible for sabotaging one of Respondent's trucks at Herby's Truck Stop during the strike. In other words, Alger discharged Robert Hudson for engaging in misconduct during the course of a protected strike. As evidenced by Respondent's November 26, 1979, letter to the Union, *supra*, Alger believed that Robert Hudson's misconduct was related to the Union's strike activity. These circumstances establish a *prima facie* violation of Section 8(a)(1) of the Act (*N.L.R.B.* v. *Burnup & Sims*, 379 U.S. 21, 23 (1964); *General Telephone Company of Michigan*, 251 NLRB 737 (1980)), and the burden shifted to Respondent to prove that it discharged Robert Hudson because of an honest belief that he engaged in strike misconduct sufficiently serious to justify his discharge. If Respondent failed to establish such an honest belief, the *prima facie* 8(a)(1) violation stands unrebutted. E.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW [Udylite Corp.]* v. *N.L.R.B.*, 455 F.2d 1357, 1367 (D.C. Cir. 1971). On the other hand, if Respondent established such an honest belief, the burden shifted to the General Counsel of proving that Robert Hudson in fact did not engage in the alleged misconduct or that the alleged misconduct was not sufficiently serious to place Robert Hudson beyond the protection of the Act. *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952), cited with approval in *N.L.R.B.* v. *Burnup & Sims, Inc., supra*, 379 U.S. at 23, fn. 3. Accord: *North Cambria Fuel Co.* v. *N.L.R.B.*, 645 F.2d 177 (3d Cir. 1981).

I am persuaded that Respondent has established that Robert Hudson was discharged on account of President Alger's good-faith belief that Robert Hudson sabotaged Respondent's truck on November 25, 1979, at Herby's Truck Stop by removing the pin from the fifth wheel thereby causing the trailer to fall on its nose when the driver moved the truck. As described in detail *supra*, Alger was notified by the driver of the truck that immediately prior to discovering that the pin had been removed from the fifth wheel the driver had observed Robert Hudson running from the truck. The fact that Alger did not immediately notify Robert Hudson that he had been discharged for this act of sabotage, but waited several months until the day Hudson unequivocally asked to be reinstated does not impugn Alger's good-faith belief because the record shows that Alger notified the Union immediately after the event that Alger considered Robert Hudson responsible for what had taken place.[18] I am also of the view that it was reasonable for Alger to believe that Robert Hudson was responsible for removing the pin in the fifth wheel even though the truckdriver did not actually see Hudson remove the pin. Alger was informed that the driver had observed Robert Hudson running from the truck immediately before the discovery that the pin had been removed from the fifth wheel and there was no other explanation to account for the pin's removal.

As described *supra*, the counsel for the General Counsel has failed to prove that Robert Hudson did not sabotage Respondent's truck. I have discredited the Hudsons' testimony that Robert Hudson did not remove the pin from the fifth wheel. Moreover, as I have found *supra*, during his August 12, 1980, conversation with Alger about returning to work Robert Hudson admitted to Alger that he was responsible for sabotaging Respondent's truck at Herby's Truck Stop.

Sections 7 and 13 of the Act grant employees, *inter alia*, the right to strike and picket; however, not all forms of conduct literally within the terms of these sections are entitled to statutory protection. In deference to the rights of employees and the public, the Board and the courts have acknowledged that serious acts of misconduct which occur in the course of a strike may disqualify a striker from the protection of the Act. In the case of unfair labor practice strikers, the misconduct of the striker must be balanced against the severity of the employer's unfair labor practices which provoked the dispute. *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973), and cases cited at footnote 15. I am persuaded that the seriousness of Robert Hudson's misconduct, when considered in the light of Respondent's unfair labor practices which caused the strike, warrants his discharge.

Robert Hudson's sabotage of Respondent's truck was not an act of impulsive behavior done at the spur of the moment on the picket line, but was apparently the result of premeditated conduct engaged in many miles from the picket line which resulted not only in the delay of Respondent's delivery and the damage to its truck but, as truckdriver Roy credibly testified, created a situation which was fraught with danger to the general public because Hudson's removal of the pin from the fifth wheel could have caused the trailer to separate from the tractor after Roy had driven onto the highway, thereby endangering the safety of other motorists. In my opinion the unfair labor practices which caused the strike herein were not of such severity as to outweigh the seriousness of Robert Hudson's misconduct. I find Hudson's misconduct was sufficiently serious to support his discharge.

The case concerning Robert Hudson's wife, Sharon Hudson, must be viewed differently than Robert Hudson's. On or about August 12, 1980, as described in detail *supra*, Sharon's husband made an unconditional request to President Alger for reinstatement of himself and Sharon. Although Alger informed Robert Hudson that he was declining to reinstate Robert Hudson because of strike misconduct he said nothing in response to the request that Sharon Hudson be reinstated. Since there is no contention that Sharon Hudson had been permanently replaced,[19] and in any event since she is an unfair labor practice striker Alger was obliged to reinstate her upon her unconditional request for reinstatement, I am of the opinion that the General Counsel has made out a *prima*

[18] I also note that the driver who reported Hudson's misconduct also advised Alger that he did not want to get involved because he was afraid of reprisals from the strikers.

[19] As indicated *supra*, I have rejected Respondent's defense that Sharon Hudson abandoned her employment with Respondent.

facie violation of the Act in the case of Sharon Hudson. In its post-hearing brief at page 27 Respondent argues that it was privileged to ignore Sharon Hudson's August 12, 1980, unconditional application to return to work because "Alger had sufficient evidence to deny [the Hudson's] reinstatement because of their strike misconduct."

The question for decision is whether Respondent had an honest belief that Sharon Hudson was jointly responsible with her husband, Robert Hudson, for sabotaging Respondent's truck. In deciding this question I note that the Board has held that "the burden of establishing an 'honest belief' of misconduct . . . requires some specificity in the record, linking particular employees to particular allegations of misconduct" and that "unauthorized acts of violence on the part of individual strikers are not chargeable to other strikers in the absence of proof that identifies them as participating in such violence." *General Telephone Company of Michigan*, 251 NLRB 737 (1980). Although an employer may justify his refusal to reinstate a striker on the ground that the striker engaged in strike misconduct so serious as to render the employee unfit for future service, responsibility for the alleged misconduct must be personal, not derivative. Absent evidence that striker "A" actually participated in, authorized, or ratified misconduct engaged in by striker "B," the Act does not permit the employer to impute this misconduct to striker "A." See, for example, *International Ladies' Garment Workers Union, AFL-CIO [B.V.D. Co. Inc.]* v. *N.L.R.B.*, 237 F.2d 545, 550-552 (1956), where the District of Columbia Circuit stated:[20]

> In a long line of cases . . . courts have without exception adhered to the principle that proof of individual wrongdoing is a prerequisite to disqualification for reinstatement and backpay . . . [T]he Board . . . has no authority to *deny* reinstatement to employees who do not [directly or indirectly participate in, authorize or ratify misconduct] . . . [A]bsent an agency relationship, an employee may not be charged with misconduct committed by others . . . [and] common law Agency principles of responsibility [which Section 2(13) of the Act mandates the Board apply] . . . preclude imputation of the acts of one person to another except when one is acting as agent for the other . . . . [Furthermore, employees are] under no obligation to disavow misconduct which they did not initiate and with which they are not shown to have been connected, directly or indirectly . . . . And their silence provides no rational basis for inferring that they acquiesced in the wrongs of others with whom no agency relationship is shown.

In the instant case the sole evidence in Alger's possession concerning Sharon Hudson's responsibility for sabotaging the Company's truck was that she was the wife of Robert Hudson, worked as a team with Robert Hudson, and was riding in the Hudsons' car with Robert Hudson when Robert Hudson sabotaged the truck.[21] Alger had no evidence that Sharon Hudson participated in, authorized, or ratified her husband's conduct. That Alger did not in fact believe Sharon was responsible for her husband's conduct is evidenced by Respondent's failure to mention her name in its November 26, 1979, letter to the Union about the incident and Alger's failure in his August 12, 1980, conversation with Robert Hudson to attribute any wrongdoing to Sharon. It is for these reasons that I find Respondent has not sustained its burden of establishing a basis for its asserted "honest belief" that Sharon Hudson engaged in unprotected activity. I therefore find that Respondent, by failing and refusing to reinstate Sharon Hudson on August 12, 1980, because of her participation in an unfair labor practice strike, violated Section 8(a)(1) of the Act.[22]

CONCLUSIONS OF LAW

1. Respondent, K & K Transportation Corp., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The strike engaged in by the employees of Respondent which commenced on November 3, 1979, was an unfair labor practice strike.
3. By failing and refusing to reinstate unfair labor practice striker Sharon Hudson on August 12, 1980, upon her unconditional application for reemployment, Respondent violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. Except as found herein, Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent failed and refused to reinstate unfair labor practice striker Sharon Hudson, I shall recommend that Respondent offer her immediate reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without loss of seniority and other rights and privileges previously enjoyed, discharging, if necessary, any replacement hired. It is further recommended that Respondent make Sharon Hudson whole for any loss of earnings or other benefits she may have suffered as a result of the discrimination against her from August 12, 1980, the date when Respondent unlawfully refused to reinstate her to the date of Respondent's offer of reinstatement, in accordance with the Board's formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[20] Accord: *Methodist Hospital of Kentucky* v. *N.L.R.B.*, 619 F.2d 563 (6th Cir. 1980); *N.L.R.B.* v. *Big Three Industrial Gas & Equipment Co.*, 512 F.2d 1404, fn. 10 (5th Cir. 1978); *N.L.R.B.* v. *Marshall Car Wheel and Foundry Co.*, 218 F.2d 409, 417-418 (5th Cir. 1955).

[21] There is no evidence that Sharon Hudson was driving the car.

[22] I shall recommend the dismissal of the complaint insofar as it alleges that Sharon Hudson's discharge violated Sec. 8(a)(3) of the Act.

Having concluded that the strike which began on November 3, 1979, was an unfair labor practice strike from its inception, I find that it will effectuate the purposes of the Act to order Respondent to offer all strikers who make unconditional offers to return to work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of Respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which each would have earned as wages during the period commencing 5 days after the date on which each one unconditionally offers to return to work to the date of Respondent's offer of reinstatement, less any net earnings during such period, with backpay and interest thereon to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]